

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Great Bridge Properties, LLC

v.

Town of Ossipee ZBA

Docket No.: 04-E-110

**ORDER ON SCOPE OF REGION**

Great Bridge Development Properties, LLC (“Great Bridge”), appeals the Town of Ossipee Zoning Board of Adjustment’s (“ZBA”) denial of its request for a variance. Specifically, Great Bridge seeks to build a multi-unit multi-family complex in Ossipee, and Ossipee’s zoning ordinances strictly limit the development of multi-family structures. In its appeal, Great Bridge challenges the reasonableness and the lawfulness of the ZBA’s decision and the validity of the ordinances in question. At the request of the parties, the court bifurcated the appeal and held a hearing to determine the scope of the region, or “community,” at issue on July 23, 2004. After review of the evidence, the parties’ arguments, and the applicable law, the court finds and rules as follows

The controlling law in this case is Britton v. Town of Chester, 134 N.H. 434 (1991), which established that zoning ordinances must be enacted by municipalities for the general welfare, “to include the general welfare of the ‘community,’ as defined in this case, in which a municipality is located and of which it forms a part.” Id. at 441. The New Hampshire Supreme Court recognized in Britton that “[w]hen an ordinance will have an impact beyond the boundaries of the municipality,

the welfare of the entire affected region must be considered in determining the ordinance's validity." 134 N.H. at 440. Specifically, "growth controls must not be imposed simply to exclude outsiders, especially outsiders of any disadvantaged social or economic group." Id. (quotations, citations, and brackets omitted).

In this case, Great Bridge's proposed development is for "workforce housing," which would provide 24 units of rental property. Great Bridge argues the housing is greatly needed in Ossipee, and that because Ossipee's zoning ordinances regarding multi-family structures effectively exclude low-income families from residing there, the ordinances are not valid. The Town maintains that the ordinances are valid.

Both parties obtained experts to prepare reports, and the experts arrived at different conclusions regarding the appropriate region for purposes of determining the validity of the ordinances. Great Bridge's expert, Russ Thibeault, determined that the region should be comprised of all of the towns located within Carroll County. The Town's expert, Brian C. Underwood, concluded that the appropriate community includes the towns located in Carroll County that are also part of the Lakes Region (Ossipee, Effingham, Freedom, Tamworth, Sandwich, Moultonborough, Tuftonboro, and Wolfeboro), and two towns sharing a boundary with Ossipee that are not in the Lakes Region (Wakefield and Brookfield).

Thibeault's analysis is based primarily upon data gathered by the U.S. Census Bureau, and focuses on the housing market in which Ossipee is situated. Specifically, Thibeault's report examines the interaction between housing and employment in defining the region. Thibeault categorizes the relationship between jobs and housing as a "critical" link in defining a community. He also examined other economic connections like shopping centers and transportation networks,

which spur employment and economic relationships between municipalities. Thibeault found that Routes 16, 25, and 28 are the major transportation links within the Ossipee housing market.

Thibeault found that there are two centers of activity in close proximity to Ossipee: Wolfeboro and Conway. He determined that Conway was the more dominant of the two, especially for retail activity, because it has more grocery stores and national chain stores like WalMart and Staples, whereas Wolfeboro has fewer, smaller stores. There are 3400 jobs in Wolfeboro and 8500 jobs in Conway. Ossipee, the Carroll County seat, has 1800 jobs, the majority of which are with the county.

According to Thibeault, the commuting data in and out of Ossipee demonstrates its economic interdependence with the region as he defines it. The data Thibeault analyzed revealed that 69 percent of Ossipee residents work in Ossipee and abutting communities, and that 74 percent of those who work in Ossipee reside in Ossipee or adjacent communities. Thibeault did not believe that defining the region as Ossipee and its abutting towns was an appropriate for the purposes of this case, however, because to do so would exclude Conway. 140 people from Conway work in Ossipee, and Conway provides jobs for 181 Ossipee residents. Conway is the third most important place of employment for Ossipee residents and the fourth most significant source of workers for Ossipee employers.

Thibeault testified there are three types of market areas in New Hampshire: labor market areas, market areas established by the New Hampshire Board of Realtors, and market areas developed by the New Hampshire Department of Economic Development. A labor market area is an operational definition based upon the relationship between jobs and housing. Ossipee is in the Conway labor market, which is essentially Carroll County. (See Pl.'s Ex. 1, Thibeault's report, at

5). Thibeault found that using Carroll County as the appropriate region encompassed both Ossipee's labor market area and the towns with which it is connected in other relevant ways.

The New Hampshire Board of Realtors establishes regional markets where local boards serve certain, specialized areas. The White Mountain Region encompasses Ossipee and the towns north of it within Carroll County. Thibeault stated that the establishment of the White Mountain Region strengthens the argument that the northern half of the county should be included in the court's analysis in this case. Finally, the New Hampshire Department of Economic Development establishes regions in which regional development corporations are allowed to work. The regions are comprised of communities with economic or business relationships. The Mount Washington Valley Economic Council serves the same region as the White Mountain Region established by the Board of Realtors.

Thibeault determined that using Carroll County as the region was practical as well. The U.S. Census compiles data on a county level, rendering data collection and analysis easier to accomplish. He noted, however, that the ease of data collection is not a primary concern, and did not weigh heavily in his analysis. Thibeault recognized that by using the county as the region for this case, he includes the far northern part of the county, which is not closely tied to Ossipee. He is confident this will not skew any results, however, as a large portion of the northern part of Carroll County is occupied by the White Mountain National Forest, in which there are few, if any, residents. Additionally, he maintains Bartlett, which is in the northern region of the county, is actually a significant town for purposes of this analysis because 50 employees commute from Bartlett to Ossipee.

Conway has the fastest job growth in the region and the fastest retail growth as well. In Conway, Thibeault observes the development of a "market covering retail center," where there is a

concentration of large national stores which must serve a larger region to survive. Most of the job growth in Conway is in retail and service jobs. Because most of the jobs in Carroll County are in retail or service, Carroll County has among the lowest wages in the state. Thibeault hypothesizes that this leads to more commuting in the county because people cannot afford to live in the communities in which they work.

Underwood's report is based upon data compiled by the Lakes Region Planning Commission. Underwood reviewed Thibeault's report, and determined that it was inappropriate to include Conway in the region. Specifically, Underwood's region is comprised of all of the towns that abut Ossipee except Madison. Underwood's exclusion of Conway is based on several factors. First, he found that 90 percent of the people in Ossipee do not go to Conway to work. Second, Underwood characterized Conway and Wolfeboro as two commercial centers, each of which would pull the residents closest to it for shopping. Ossipee is closer to Wolfeboro. Underwood also determined that the drive to Conway from Ossipee is more traffic laden and difficult than the drive to the Dover/Rochester area, and the same stores are available in Dover/Rochester as are in Conway. In this light, he excluded Madison because it is closer to Conway than to Wolfeboro.

Based on the data he analyzed, and his understanding of Britton, Underwood does not find that Conway should be included in a region with Ossipee. He finds that Ossipee and Conway are not relevant to each other either statistically or rationally. Further, they are in different school districts, have different medical service centers, and the residents have different community ties.

Thibeault maintains his analysis is more statistically based than Underwood's. Additionally, he employed a market analysis approach in which the primary "market" is defined as one in which 70 percent of commuters, shoppers, or workers is contained. Thibeault argues that Underwood's region only contains 46 percent of the commuters into Ossipee and 55 percent of the commuters out

of Ossipee, when those people who both live and work in Ossipee are not considered. By expanding the region to the county, 67 percent of the commuters into Ossipee and 77 percent of those who commute out of Ossipee for work are included. Thibeault maintains the region in his report more accurately reflects the primary market.

Additionally, Thibeault discounts Underwood's reliance on school districts. Thibeault maintains school districts are political, and not an indication of the interrelatedness of communities. Thibeault also finds that the county approach is more reliable than an analysis based on the Lakes Region Planning Commission's report because the Lakes Region is defined by Lake Winnepesaukee. Lake Winnepesaukee, however, bisects the Lakes Region, making the commuting and commercial relationships which are present in Carroll County impossible. Thibeault and Underwood both represent that a "community" is comprised of more factors than housing, commuting, and shopping. Nevertheless, the intangible aspects of community cannot be documented or analyzed in the statistical manner in which economic factors can.

While Britton states that zoning ordinances must be enacted in the interest of the general welfare of a community "in which a municipality is located and of which it is a part," 134 N.H. at 441, it does not clearly define how the court is to arrive at a decision on what that community is. New Jersey courts have extensively addressed this issue. In So. Burlington Cty. N.A.A.C.P. v. Township of Mt. Laurel, 330 A.2d 713 (N.J. 1974), the New Jersey Supreme Court found that "[t]he composition of the applicable 'region' will necessarily vary from situation to situation and probably no hard and fast rule will serve to furnish the answer in every case." Id at 733. However, in that case, the court approved the trial judge's use of data on the housing needs of low and moderate income residents or prospective residents of the town or those employed or expected to be employed by the town in determining the region. Id. Likewise, the same court later held:

the breadth of approach by the experts to the factor of the appropriate region and to the criteria for allocation of regional housing goals to municipal subregions is so great and the pertinent economic and sociological considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authoritative.

Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192, 1201 (N.J. 1977) (quotations omitted).

Even so, the court stressed that “the gross regional goal shared by the constituent municipalities be large enough fairly to reflect the full needs of the housing market area of which the subject municipality forms a part.” Id. at 1219. The court concluded:

in evaluating any expert testimony . . . , weight should be given to the degree to which the expert gives consideration to the areas from which the lower income population of the municipality would substantially be drawn absent exclusionary zoning. . . . This is broadly comparable to the concept of the relevant housing market area . . .

Id. at 1221. Included in this analysis is an examination of where the residents of the community live, shop, work, go to school, and seek other amenities. Id.

In keeping with the New Jersey court’s analysis of relevant factors to consider, Britton states that “[w]hen an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must be considered in determining the ordinance’s validity.” Id. 134 N.H. at 440 (citing Association Home Builders v. City of Livermore, 557 P.2d 473, 487 (Cal. 1976)). Accordingly, the court finds the “region” is composed of those towns which will be affected by a challenged ordinance.

Based on the foregoing, the region established in Underwood’s report is insufficient because it excludes Conway, which is closely tied to Ossipee in both commercial and housing relationships. Conway is the third largest source of jobs for Ossipee residents and the fourth largest supplier of employees for Ossipee businesses. Although Wolfeboro is a large commercial center, Conway provides a great deal of shopping and has many large national stores that are not available in

Wolfeboro. Were housing of the type precluded by the Ossipee zoning ordinances available, people from all of the towns in Carroll County would arguably seek to live in Ossipee. The court would be remiss were it to too narrowly circumscribe the region, and finds that omitting Conway from the analysis would do so. Conway must be included in any analysis of the impact of an Ossipee zoning ordinance. Also, the court agrees with Thibeault that the inclusion of towns such as Jackson and Chatham in the far north of Carroll County will not significantly affect any results because those towns are mostly comprised of the White Mountain National Forest.

The court, therefore, adopts Carroll County, the finding in Thibeault's report, as the appropriate region for this case.

**So Ordered.**

August 6, 2004

Date

Bruce E. Mohl

Presiding Justice